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No. 04-1327

In the Supreme Court of the United States

BOBBY LEE HOLMES, PETITIONER

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR THE STATES OF KANSAS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a State may exclude from a criminal trial "third-party-guilt" evidence that does not give rise to a reasonable inference that someone other than the defendant actually committed the charged offense.

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INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose petitioner's effort to restrict the substantial latitude and "respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Chambers* v. *Mississippi*, 410 U.S. 284, 302-303 (1973). This Court has long recognized that "preventing and dealing with crimes is much more the business of the States than it is of the Federal Government," *Patterson* v. *New York*, 432 U.S. 197, 201 (1977), and it has cautioned that "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of state evidentiary rules," *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983).

Petitioner seeks just this sort of "finely tuned review" of South Carolina's approach to the admission of "third-party-guilt" evidence. Under petitioner's theory, neither South Carolina nor any other State may apply evidentiary rules to exclude evidence that the criminal defendant deems important to his defense, regardless of its reliability, its tendency actually to prove his innocence, or its likelihood to confuse the jury. Indeed, according to petitioner's approach, the defendant's right to a fair trial includes a right to present evidence that does not even raise a reasonable inference that a third party committed the charged offense.

This Court has never adopted such an expansive view of due process, and it has traditionally deferred to the States' efforts to fashion criminal trial procedures aimed at establishing guilt or innocence rather than testing every hypothesis offered by the accused. This case thus implicates the ability of all the States to craft rules of evidence, legislatively or through common-law adjudication, that promote the truth-finding function of criminal trials.

Amici States have varying approaches to the admission of third-party-guilt evidence, but a common goal: to ensure that a criminal trial does not become a forum for the

defendant's speculation. Most of these States require the defendant to show one or more of the following: that his proffered evidence bears a direct connection to the charged offense; that it points clearly to a third party's culpability; or that it raises a reasonable inference of the defendant's innocence—all to ensure that the jury decides criminal cases based not on speculation and conjecture, but on evidence that is relevant and reliable. A summary of the various States' rules appears in the Appendices. Although their approaches differ in certain respects from South Carolina's, *amici* States are uniformly committed to distinguishing evidence that meaningfully bears on the defendant's guilt or innocence from self-serving accusations that achieve little more than misdirection and confusion.

Amici States believe the Constitution preserves their right to adopt and enforce such reasonable evidentiary rules. Restrictions on the admissibility of third-party-guilt evidence have an established pedigree in state and federal courts nationwide, and such restrictions should not be cast aside without strong justification. The Court's decision in this case will have a significant impact on the latitude that States enjoy in their treatment of third-party-guilt evidence. Accordingly, in this important area, *amici* urge the Court to reaffirm both its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings" by state courts, *Crane* v. *Kentucky*, 476 U.S. 683, 689 (1986), and its longstanding policy not to "lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201.

STATEMENT

A South Carolina jury convicted petitioner of murder, first-degree burglary, first-degree criminal sexual conduct, and robbery in connection with a brutal attack against 86-year-old Mary Stewart. After finding three aggravating circumstances—that the murder was committed during a burglary, that the murder was committed during criminal

sexual conduct, and that the murder involved physical torture—the jury imposed a sentence of death.[1]

On direct appeal to the Supreme Court of South Carolina, petitioner challenged his conviction on the ground that the trial court improperly excluded evidence that would have shown that another man, Jimmy McCaw White, actually committed the murder. Petitioner proffered two types of evidence: (1) testimony from witnesses placing White in the victim's neighborhood near the time of the murder; and (2) testimony from witnesses suggesting that White had "confessed" to committing the murder.

The trial court held a pretrial hearing to determine whether petitioner could present evidence implicating White in the murder. White himself testified at the pretrial hearing, and his testimony was inconsistent with that of petitioner's witnesses. He denied committing the murder and denied making the "confessions" attributed to him by petitioner's witnesses. In response to petitioner's suggestion that White committed the murder, the State proffered testimony from a forensic examiner from the Federal Bureau of Investigation. According to this examiner, a sample of White's blood was tested and the results *excluded* him as the perpetrator of this crime. Moreover, the victim—who initially survived the attack and described her assailant to police investigators before she died—gave a description that matched the petitioner.

The Supreme Court of South Carolina rejected petitioner's claim on appeal and held that his proffered

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[1] This was petitioner's second trial. A jury had previously found petitioner guilty of the same offenses and sentenced him to death. The Supreme Court of South Carolina affirmed the conviction and the sentence, see *State* v. *Holmes*, 464 S.E.2d 334 (S.C. 1995), and this Court denied certiorari, see *Holmes* v. *South Carolina*, 517 U.S. 1248 (1996). On state post-conviction review, however, petitioner was granted a new trial.

evidence was insufficient to satisfy the requirements of *State* v. *Gregory*, 16 S.E.2d 532 (S.C. 1941), and *State* v. *Gay*, 541 S.E 2d 541 (S.C. 2001), for admission of third-party-guilt evidence. Under those decisions, the admission of such evidence must be "limited to such facts as are inconsistent with [the defendant's] own guilt, *and* to such facts as raise a reasonable inference or presumption as to his own innocence." *Gregory*, 16 S.E.2d at 534 (emphasis added).

Thus, a criminal defendant in South Carolina may not introduce evidence that has "no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another." *Ibid.* To ensure that third-party-guilt evidence raises a reasonable inference of the defendant's innocence and does not merely cast "bare suspicion" on a third party, state law requires that "before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." *Gregory*, 16 S.E.2d at 535.

Following these principles, the Supreme Court of South Carolina held in *Gay* that third-party-guilt evidence was properly excluded where the "totality of the evidence against [the defendant] and the nature of the evidence proffered regarding [the third party]" demonstrated that the third-party-guilt evidence "was *not inconsistent* with [the defendant's] guilt and thus would serve merely to cast suspicion" upon the third party. 541 S.E.2d at 544-545 (emphasis added). The defendant in *Gay* had sought to introduce evidence showing that a third party had threatened the victim's life repeatedly, even on the day of her death. *Id.* at 544. The court ruled, however, that this evidence "did not raise a reasonable inference as to [the defendant's] own innocence" because of the "strong evidence of [his] guilt—especially the forensic evidence—and the fact that the forensic experts found that the samples from [the third party] did not match any evidence gathered

in [the] case." *Id.* at 545 (quotations omitted). Although the proffered evidence suggested the third party's motive and opportunity to commit the murder, it did not negate the evidence proving the defendant's guilt. *Ibid.*

Applying *Gregory* and *Gay*, the court below examined the proffered testimony and the evidence presented to the jury and concluded that petitioner's proffered evidence did not create a reasonable inference of his innocence. Specifically, the court noted that the forensic evidence overwhelmingly pointed to petitioner—and petitioner alone—as the victim's attacker. For example, the court noted that fibers consistent with petitioner's sweatshirt and jeans were found on the victim's bed sheets and nightgown; that fibers consistent with the victim's nightgown were found on petitioner's underwear; that petitioner's tank top contained a mixture of his blood and the victim's blood; that petitioner's underwear contained a mixture of DNA from two people and that forensic examination had excluded as the sources of this DNA *99.99% of the population other than petitioner and the victim*. Relatedly, the court cited the testimony of the FBI forensic examiner, who stated that tests performed on White's blood *excluded* him as Mrs. Stewart's attacker.

This evidence of petitioner's guilt was further supported by the victim's own description of her assailant and the *undisputed* fact that petitioner was in the victim's neighborhood only 45 minutes before the crime was committed—much closer to the time of the attack than White's *disputed* appearance in the neighborhood. The court also cited the fact that, although petitioner told the police he had never been inside the victim's apartment, his palm print was found on the inside of her front door.

For all these reasons, the court below concluded that petitioner's proffered third-party-guilt evidence was not inconsistent with his own guilt, did not give rise to a reasonable inference of his innocence, and would have

accomplished nothing more than to cast suspicion on another person.

SUMMARY OF ARGUMENT

I. A criminal defendant's right to present a defense is not absolute, but is subject to reasonable restrictions on the admissibility of evidence. Indeed, the integrity of criminal trials—and their effectiveness in ascertaining the truth—depends in large part on exclusion of unreliable evidence. Thus, although the Constitution guarantees the right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that the defendant wishes to present. So long as the States' exclusionary rules are not arbitrary or disproportionate to the purposes they are designed to serve, they are valid. This Court, moreover, has generally found due process violations only when state courts have applied their evidentiary rules to mandate exclusion of *entire categories* of evidence, without regard to the particular circumstances of the case and without any exercise of individualized discretion by the trial court.

Here, by contrast, South Carolina's rule on third-party-guilt evidence provides for fact-specific analysis of the reliability of third-party guilt evidence, and is therefore valid under the Due Process Clause. This conclusion is confirmed by longstanding practice in the federal courts and in the courts of other States.

II. Requiring a criminal defendant to demonstrate that his third-party-guilt evidence raises a reasonable inference of his innocence does not violate his Sixth Amendment right to a jury trial. Questions of admissibility are for courts, not juries, and the federal and state courts in our constitutional system have always based admissibility determinations on whether the proponent has established certain predicate facts by a preponderance of the evidence—even in criminal cases. Although the State must prove each element of the

crime at issue beyond a reasonable doubt, the standards for determining the admissibility of evidence are not governed by the reasonable doubt standard. That is true in the federal system as well as the vast majority of the States.

South Carolina's rule, which requires only that the defendant's third-party guilt evidence raise a reasonable inference of his innocence, therefore does not violate the Sixth Amendment.

III. Even if this Court were to conclude that South Carolina's application of its rules on third-party-guilt evidence was erroneous in this case, any such error would be subject to harmless-error review. Most constitutional errors are "trial errors" that are subject to harmless error analysis, and generally do not involve the sort of "structural defect" that affects the whole framework of the trial and requires reversal of the conviction. Indeed, this Court has already recognized that Sixth Amendment errors are subject to harmless-error analysis.

ARGUMENT

I. A Criminal Defendant's Right To Present A Defense Does Not Trump States' Reasonable Restrictions On The Admissibility Of Evidence.

As a general matter, the Constitution does not displace the States' rules of evidence. Although a criminal defendant has a right to present a complete defense, he must do so within ordinary trial procedures and rules of evidence. The States have wide latitude to prescribe such rules of evidence, and this Court will invalidate an evidentiary rule only in highly unusual circumstances. Far from creating any such unusual circumstance, South Carolina's approach to third-party-guilt evidence comports with both this Court's decisions and historic practice in federal and state courts.

A. Under this Court's decisions, the right to present a defense is subject to reasonable restrictions that provide for an individualized analysis of the probative value of the defendant's evidence.

A criminal defendant's right to present evidence in his defense is not absolute, but is "subject to reasonable restrictions." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). Such restrictions serve "legitimate interests in the criminal trial process" itself, which ensure that the criminal trial proceeds efficiently and produces reliable results. *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). Indeed, this Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane*, 476 U.S. at 690.

As this Court has recognized, the States may take steps to maintain "[t]he integrity of the adversary process" itself. *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988). The integrity of a criminal trial "depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. In furtherance of these legitimate interests, trial courts "retain wide latitude" to limit the presentation of evidence that will result in "confusion of the issues" or that is "repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

Recognizing the importance of these interests, this Court has held that, in the exercise of his right to present a defense, a criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. For example, a criminal defendant does not have a

constitutional right to present evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion). And even otherwise admissible evidence may be excluded as a sanction for the defendant's failure to comply with a valid discovery order. See *Taylor*, 484 U.S. at 414-417; *United States* v. *Nobles*, 422 U.S. 225, 241 (1975). Although the Constitution guarantees a criminal defendant's right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that he wishes to present. *Egelhoff*, 518 U.S. at 42.

The States have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer*, 523 U.S. at 308, and this Court will not "engage in a finely tuned review of * * * state evidentiary rules" under the guise of due process analysis. *Lonberger*, 459 U.S. at 438 n.6. Moreover, States may employ differing approaches to evidentiary issues without running afoul of the Constitution. See *Scheffer*, 523 U.S. at 318 (Kennedy, J., concurring). Although the States' prerogatives to regulate the presentation of evidence in criminal trials are not unfettered, petitioner bears a heavy burden to show that the exclusion of third-party-guilt evidence from his trial violated the Constitution. See *Egelhoff*, 518 U.S. at 42-43.

A criminal defendant cannot complain that a State's evidentiary rules violate his constitutional right to present a defense so long as those rules are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55. Applying this principle, the Court has found that evidentiary rules violated due process only where they mandated exclusion of *entire categories* of evidence, without regard to the particular circumstances of individual cases and without occasion for an exercise of discretion by the trial court.

In *Washington* v. *Texas*, 388 U.S. 14 (1967), for example, this Court reversed a criminal conviction where the trial court excluded a confession from a witness who had previously been convicted of the same offense. *Id.* at 23. Although this proffered testimony "would have been relevant and material," and although it was "vital to the defense," the trial court excluded the testimony because state law provided that persons charged with, or convicted of, the same crime could not testify in each other's behalf. *Id.* at 16. This Court held that, by applying this categorical rule of exclusion, the State "arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

Similarly, the Court in *Chambers* reversed a criminal conviction where the trial court excluded third-party-guilt evidence on the grounds that (1) a defendant could not impeach his own witness under any circumstance, and (2) out-of-court statements made by a third party were inadmissible hearsay, even if they were statements against penal interest. 410 U.S. at 294-303. The Court rejected the State's argument that the right to confront adverse witnesses through impeachment depended upon the "technicality" of which party had called the witness to testify. *Id.* at 298. Concerning the proffered hearsay testimony, the Court began by noting that the evidence "bore persuasive assurances of trustworthiness" and concluded that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. But again, as in *Washington*, the State in *Chambers* had applied categorical rules of exclusion without regard to the particular circumstances of the case or the reliability of the evidence, and without any exercise of the trial court's discretion.

If there were any doubt about the principle that guided the Court in *Chambers*, it would be resolved by the fact that

the Court expressly limited its decision to the particular facts of that case: "[W]e establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 302-303. See also *Egelhoff*, 518 U.S. at 52-53 (describing *Chambers* as "an exercise in highly case-specific error correction"); *Scheffer*, 523 U.S. at 316 (noting the limitation of *Chambers*). Thus, after *Chambers*, the States remain free to fashion rules requiring exclusion of evidence under certain circumstances, provided they do not simply apply blanket exclusions of an entire class of evidence without regard to its particular relevance under the circumstances of the defendant's case. See *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (*per curiam*).

This conclusion is confirmed by *Rock* v. *Arkansas*, 483 U.S. 44, 56-62 (1987), where the Court reversed a conviction based upon the trial court's refusal to permit the defendant to testify about facts she recalled only after undergoing hypnosis. Critical to the Court's holding was the fact that "[t]he Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testimony may be admissible in a *particular* case; it is a *per se* rule prohibiting the admission at trial of *any* defendant's hypnotically refreshed testimony on the ground that such testimony is *always* unreliable." *Id.* at 56 (emphasis added). Application of this rule resulted in an *arbitrary* denial of the defendant's right to present a defense, since the rule "operate[d] to the detriment of *any* defendant who undergoes hypnosis, *without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.*" *Ibid.* (emphasis added).

The Court in *Rock* acknowledged the "State's legitimate interest in barring unreliable evidence" from a criminal trial, but concluded that this interest "does not extend to *per se* exclusions [of evidence] that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections." 483 U.S. at 61.

Taken together, *Washington*, *Chambers*, and *Rock* confirm that due process is satisfied where the admission of evidence proffered by the defendant depends on the court's exercise of individualized discretion in the context of the trial, not on categorical assumptions about the reliability of certain kinds of evidence. *Cf. Taylor*, 484 U.S. at 417 (approving the trial court's discretionary exclusion of evidence as a discovery sanction).[2] This principle reflects the Court's consistent view that the hallmark of due process is a meaningful opportunity to be heard on the specific circumstances of an individual case. *E.g.*, *Deck* v. *Missouri*, 125 S. Ct. 2007, 2014 (2005) (holding that "due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case"); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 644 (1974) (holding that due process does not allow mandatory leave rules requiring termination of teachers in their fifth and sixth months of pregnancy, because "[t]here is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job").

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[2] This Court has even invalidated a categorical rule *forbidding exclusion* of certain evidence. See *Michigan* v. *Lucas*, 500 U.S. 145, 151-153 (1991) (holding that that "[t]he Sixth Amendment is not so rigid" as to forbid exclusion of evidence as a sanction for a defendant's violation of a legitimate procedural rule).

South Carolina's requirement that third-party-guilt evidence must raise a reasonable inference of the defendant's innocence is fully consistent with these decisions. Determining whether the defendant's proffered evidence is sufficiently probative to raise such an inference is necessarily a fact-specific exercise, and the determination helps ensure the integrity of the trial process. Moreover, as explained above, the court below conducted an individualized analysis in determining whether to admit the evidence proffered by the petitioner here. Due process requires nothing more.

B. South Carolina's rule on third-party-guilt evidence also comports with traditional practice under federal and state law.

South Carolina's rules on admissibility of third-party-guilt evidence are also "reasonable" in that they do not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (quotations omitted).

1. As this Court has emphasized "from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). "[I]n all due-process cases," moreover, the "Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause." *Washington* v. *Glucksberg*, 521 U.S. 702, 710, 721 (1997) (quotations and citation omitted).

Where a practice enjoys the support of a large majority of the States and the imprimatur of long experience, this Court has been extremely reluctant to strike it down under the Due Process Clause. *E.g.*, *id.* at 723 ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy

choice of almost every State"); *Burnham* v. *Superior Court*, 495 U.S. 604, 615 (1990) (plurality opinion); *Schall* v. *Martin*, 467 U.S. 253, 266-267 (1984). As Justice Holmes expressed the point in *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22 (1922): "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Id.* at 31.

Following this principle, the plurality in *Schad* v. *Arizona*, 501 U.S. 624 (1991), concluded that "historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong indication that they do not 'offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 642. This conclusion reflected the simple fact that "legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process." *Ibid.* The concurrence in *Schad* accorded even greater weight to historical practice, stating that "it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'" 501 U.S. at 651 (Scalia, J., concurring).

2. Under this mode of analysis, petitioner must show that his right to present evidence that does not raise a reasonable inference of the third party's culpability is a "fundamental principle of justice." *Egelhoff*, 518 U.S. at 43. But he cannot make this showing here because the relevant "historical practice" confirms that this Court and many States have excluded such evidence for more than a century. *Ibid.*; see also *Medina* v. *California*, 505 U.S. 437, 446 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental").

Until *Chambers* was decided in 1973, this Court (and most States) "followed the 19th-century English rule that

categorically refused to recognize any 'against penal interest' exception to the hearsay rule, holding instead that under federal law only hearsay statements against pecuniary (and perhaps proprietary) interest were sufficiently reliable to warrant their admission at the trial of someone other than the declarant." *Lilly* v. *Virginia*, 527 U.S. 116, 129 (1999) (citing *Donnelly* v. *United States*, 228 U.S. 243 (1913)). For example, the Court in *Donnelly* held that a third party's confession to the charged offense was not admissible at the defendant's trial because it was not a statement against pecuniary interest. 228 U.S. at 272-277. Indeed, the Court there observed that "[i]n this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused." *Id.* at 273.

Thus, for almost the first two hundred years of the Republic, criminal defendants were not entitled to introduce evidence of a third party's out-of-court confession to the charged offense unless that confession constituted a statement against pecuniary interest.

Similarly, it has been the rule in federal criminal trials since at least 1891 that third-party-guilt evidence is not admissible if it is "so remote or insignificant as to have no legitimate tendency to show that [the third party] could have committed" the charged offense. *Alexander* v. *United States*, 138 U.S. 353, 356 (1891). Indeed, as the Court explained in *Alexander*, "it would be the *duty* of the court to exclude the [third-party-guilt] testimony" at issue in that case if "it were clearly proven that the murder was committed before the threats of [the third party] were uttered, or the two occurrences were so remote in time and place as to demonstrate that there could have been no connection between them." *Ibid.* (emphasis added).

Not surprisingly, federal courts have consistently held that third-party-guilt evidence is not admissible unless it

bears a sufficient connection to the specific crime charged. *E.g.*, *Wade* v. *Mantello*, 333 F.3d 51, 57-62 (2d Cir. 2003); *DiBenedetto* v. *Hall*, 272 F.3d 1, 7-9 (1st Cir. 2001); *Guam* v. *Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); *Glaze* v. *Redman*, 986 F.2d 1192, 1195-1197 (8th Cir. 1993); *Cikora* v. *Dugger*, 840 F.2d 893, 897-898 (11th Cir. 1988); *United States* v. *Cabrerra*, 80 F.3d 558, 1996 WL 135718, at *2-*3 (D.C. Cir. Feb. 15, 1996) (unpublished). For example, the Ninth Circuit has concluded that a district court properly excluded third-party-guilt evidence where that evidence "was not so closely connected to the issue of [the defendant's] guilt or innocence that its exclusion, based on its lack of probity and its tendency to confuse the jury, violated due process or the right of compulsory process." *Perry* v. *Rushen*, 713 F.2d 1447, 1455 (9th Cir. 1983).

In their consideration of third-party-guilt evidence, the States consider both the probative value of the proffered evidence and the likelihood that admission of such evidence would result in confusion of issues, undue delay, and waste of judicial resources.[3] Most States have specific rules to guide their trial courts in this balancing analysis. As shown in the Appendices, most state courts have held that third-party-guilt evidence is not admissible unless it bears such a connection to the charged offense that it suggests the innocence of the accused.[4] Some States require that the

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[3] *E.g.*, *Florida* v. *Savino*, 567 So.2d 892, 894 (Fla. 1990); *Iowa* v. *Wilson*, 406 N.W.2d 442, 447-448 (Iowa 1987); *People* v. *Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001); *South Dakota* v. *Jenner*, 451 N.W.2d 710, 722 (S.D. 1990).

[4] *E.g.*, *Smithart* v. *Alaska*, 988 P.2d 583, 586 (Alaska 1999); *Shields* v. *Arkansas*, 166 S.W.3d 28, 32 (Ark. 2004); *People* v. *Hall*, 718 P.2d 99, 104 (Cal. 1986) (*en banc*); *People* v. *Mulligan*, 568 P.2d 449, 456 (Colo. 1977); *Connecticut* v. *West*, 877 A.2d 787, 802 (Conn. 2005); *Winfield* v. *United States*, 676 A.2d 1, 4-5 (D.C. 1996) (*en banc*); *Klinect* v. *State*, 501 S.E.2d 810, 813 (Ga. 1998); *Hawaii* v. *Rabellizsa*, 903 P.2d 43, 47 (Haw. 1997); *People* v. *Fort*, 618 N.E.2d 445, 455 (Ill.

proffered evidence point clearly or directly to the third party's guilt.[5] Other States require that the proffered evidence raise a reasonable doubt as to the defendant's guilt,[6] or, put another way, raise a reasonable inference of the defendant's innocence.[7] Indeed, until 1986, California required that the defendant demonstrate a *substantial probability* of the third party's guilt.[8] Despite their variations, these rules share a common purpose—to prevent

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App. Ct. 1993); *Kansas* v. *Adams*, 124 P.3d 19, 28 (Kan. 2005); *Beaty* v. *Kentucky*, 125 S.W.3d 196, 208 (Ky. 2003); *Maine* v. *Dechaine*, 572 A.2d 130, 134 (Me. 1990); *Commonwealth* v. *Scott*, 564 N.E.2d 370, 374 (Mass. 1990); *Minnesota* v. *Jones*, 678 N.W.2d 1, 16-17 (Minn. 2004); *Moore* v. *State*, 175 So. 183, 184 (Miss. 1937); *Missouri* v. *Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*); *New Jersey* v. *Cotto*, 865 A.2d 660, 669-670 (N.J. 2005); *Gore* v. *Oklahoma*, 119 P.3d 1268, 1274 (Okla. Crim. App. 2005); *Pennsylvania* v. *Saksek*, 522 A.2d 70, 71-72 (Pa. Super. Ct. 1987); *State* v. *Mendoza*, 709 A.2d 1030, 1035-1036 (R.I. 1998); *State* v. *Gregory*, 16 S.E.2d 532, 534-535 (S.C. 1941); *Wiley* v. *Texas*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002); *Vermont* v. *Grega*, 721 A.2d 445, 454 (Vt. 1998); *Washington* v. *Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*); *West Va. v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000); *Wisconsin* v. *Denny*, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984).

[5] *E.g.*, *Shields*, 166 S.W.3d at 32 (Arkansas); *Idaho* v. *Larsen*, 415 P.2d 685, 690 (Idaho 1966); *North Carolina* v. *Israel*, 539 S.E.2d 633, 637 (N.C. 2000); *Gore*, 119 P.3d at 1274 (Oklahoma); *Gregory*, 16 S.E.2d at 535 (South Carolina); *Oliva* v. *Virginia*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995); *Matter of Lord*, 868 P.2d 835, 849 (Wash. 1994) (*en banc*).

[6] *E.g.*, *Arizona* v. *Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*); *Shields*, 166 S.W.3d at 32 (Arkansas); *Hall*, 718 P.2d at 104 (California); *McCullough* v. *United States*, 827 A.2d 48, 55 (D.C. 2003); *Maine* v. *Conlogue*, 474 A.2d 167, 172 (Me. 1984); *New Jersey* v. *Sturdivant*, 155 A.2d 771, 778 (N.J. 1959).

[7] See *Klinect*, 501 S.E.2d at 814 (Georgia); *Gregory*, 16 S.E.2d at 534 (South Carolina).

[8] See *Hall*, 718 P.2d 99, 101 (Cal. 1986); *People* v. *Green*, 609 P.2d 468, 480 (Cal. 1980).

the trial of the accused from degenerating into confusing minitrials of collateral issues that would only cast suspicion upon third parties.[9]

This record of the practice of federal and state courts alike demonstrates that the purported right of a criminal defendant to present third-party-guilt evidence that does not have a legitimate tendency to prove, or cannot raise a reasonable inference of, the defendant's innocence is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202. These decisions thus further demonstrate that South Carolina's rule is fully consistent with due process.

3. These decisions also directly refute petitioners' assertion that South Carolina's approach to third-party-guilt evidence is somehow "idiosyncratic." Pet. Br. 20. The South Carolina Supreme Court described its rule as follows: "The evidence offered by [the] accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *State* v. *Holmes*, 605 S.E.2d 19, 23 (S.C. 2004). The court adopted these standards *verbatim* from *Corpus Juris* and *American Jurisprudence* more than sixty years ago. See *Gregory*, 16 S.E.2d at 534-535.

South Carolina's requirement—that a defendant's proffered evidence suggest the third party's sole culpability in the charged offense to such a degree that a juror reasonably could doubt the defendant's guilt—was not

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[9] See, *e.g.*, *Smithart*, 988 P.2d at 586-587; *Larsen*, 415 P.2d at 690; *Wilson*, 406 N.W.2d at 448; *Dechaine*, 572 A.2d at 134; *Oliva*, 452 S.E.2d at 880; *Denny*, 357 N.W.2d at 17.

unique in 1941, and it is not unique today. Indeed, the same authorities that South Carolina relied upon in adopting its rule in 1941 contain similar formulations of the standard rule concerning third-party-guilt today. See 41 C.J.S. *Homicide* § 216, at 56-58 (1991); 40A Am. Jur. 2d *Homicide* § 286, at 136-138 (1999).

Nor does the state court's consideration of the strength of the evidence in *the State's* case render the application of its rule on third-party-guilt evidence "idiosyncratic." As a distinguished panel of the D.C. Circuit (Edwards, C.J., Wald, Henderson) has explained, in determining whether to admit "evidence inculpating a third party," courts should consider "the *relative* strength of the evidence that the third party committed the crime *compared with the evidence that the defendant committed the crime.*" *Cabrerra*, 1996 WL 135718, at *2 (emphasis added); accord *Glaze*, 986 F.2d at 1196-1197 (finding no due process violation *"[i]n view of the evidence of guilt*, the lack of reliability of the excluded evidence and the conduct of the entire trial").

Just last month, the Supreme Court of Kansas rejected a defendant's claim that the exclusion of certain third-party-guilt evidence violated his due process rights, noting that "[t]he State had a wealth of evidence against [the defendant], both direct and circumstantial" and that "[w]ithout competing evidence on the mechanism and timing of the fatal injuries, [the defendant's] effort to pin blame on [the third party] amounted to baseless innuendo." *Adams*, 124 P.3d at 29.

Similarly, the California Court of Appeal has held that a trial court properly excluded third-party-guilt evidence where "the prosecutor's offer of proof—that the [third party's] fingerprints proved that he could not have been the intruder—was 'too strong' to overcome." *People* v. *Johnson*, 200 Cal. App. 3d 1553, 1564 (Cal. Ct. App. 1988). Specifically rejecting the defendant's charge that the trial court had improperly invaded the province of the jury, the court

concluded that the trial court's assessment of the totality of the evidence was appropriate. "Simply put," the court concluded, "[the defendant] raised a possibility that the prosecution's evidence made an impossibility. As his proffered evidence could not logically raise a reasonable doubt about his guilt, the trial court properly excluded it." *Ibid.*

In sum, the decision below was a fact-specific application of a reasonable restriction on the admissibility of third-party-guilt evidence. Exclusion of petitioner's proffered evidence promoted the truth-finding function of the trial by focusing the jury's attention on evidence that bore directly on petitioner's conduct and insulating the jury from speculative accusations against Jimmy White and police investigators.

II. Requiring Defendants To Make An Initial Showing That Their Proffered Evidence Raises A Reasonable Inference Of Innocence Does Not Violate The Right To A Jury Trial.

Requiring a criminal defendant to demonstrate that his third-party-guilt evidence raises an inference of his innocence also does not violate his Sixth Amendment right to a jury trial. Questions of admissibility are for courts, not juries, and courts routinely make determinations of admissibility based on whether the proponent has established a proper foundation. The right to a jury trial has never included the right to have juries determine whether proffered evidence is properly admissible.

A. Under this Court's decisions, courts properly exclude evidence where defendants fail to establish, by a preponderance of the evidence, the facts upon which admissibility depends.

This Court has long recognized the "normal rule that the admissibility of evidence is a question for the court rather than the jury." *Lego* v. *Twomey*, 404 U.S. 477, 490 (1972);

accord *Gila Valley, Globe, & N. Ry. Co.* v. *Hall*, 232 U.S. 94, 103 (1914) ("Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact"). Thus, cases involving the constitutionality of admitting or excluding evidence at trial have focused on the trial court's role in determining the admissibility of evidence. *E.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 180 (1997) (addressing the trial court's discretion to exclude evidence under Fed. R. Evid. 403); *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (describing the trial court's gatekeeping function in cases involving expert opinion testimony); *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987) (defining the standard of proof for facts necessary to the trial court's determination whether a hearsay exception applies). As the Court has explained, "[e]vidence is placed before the jury when it satisfies the technical requirements of the evidentiary [r]ules, which embody certain legal and policy determinations." *Bourjaily*, 483 U.S. at 175.

1. Determining whether proffered evidence satisfies these rules is the task of the trial court, and the question decidedly is not "whether the proponent of the evidence wins or loses his case on the merits." *Ibid.* Because "the evidentiary standard is unrelated to the burden of proof on the substantive issues" (*ibid.*), an evidentiary rule requiring that third-party-guilt evidence suggest an inference of the defendant's innocence does not run afoul of *In re Winship*, 397 U.S. 358 (1970). As this Court has noted, "*Winship* went no further than to confirm the fundamental right that protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Lego*, 404 U.S. at 486 (quotations omitted). In short, *Winship* "was not concerned with standards for determining the admissibility of evidence." *Id.* at 486.

The Federal Rules of Evidence, proposed by this Court, reflect the same reasoning. Rule 104(a) states that "preliminary questions concerning *** the admissibility of evidence shall be determined by the court." In making this determination, the court is not bound by the rules of evidence, see Fed. R. Evid. 104(a), and it need only find the preliminary fact by a *preponderance* of the evidence. See *Bourjaily*, 483 U.S. at 176 ("when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence").

The same is true in cases involving so-called conditional relevance under Fed. R. Evid. 104(b). Where the relevance of evidence depends upon the fulfillment of a factual condition, the court "shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). In determining whether such a condition has been fulfilled, a trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact *** by a preponderance of the evidence." *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988).

Thus, even in criminal cases, it is not unusual for courts to make determinations of admissibility based on facts established by a preponderance of evidence. For example, the Court in *Lego* concluded that a trial court should "admit into evidence only those confessions that he reliably found, *at least by a preponderance of the evidence*, had been made voluntarily." 404 U.S. at 484-487 (emphasis added). And the Court in *Colorado* v. *Connelly*, 479 U.S. 157 (1986), held that "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver *only by a preponderance of the evidence*." *Id.* at 168 (emphasis added). These decisions demonstrate that the Court has not thought it inappropriate, or unconstitutional, for trial courts to make preliminary

findings in determining the admissibility of proffered evidence.[10]

2. The fact that the court below considered the State's evidence of guilt in determining whether petitioner's evidence raised such an inference does not create any Sixth Amendment problem. Indeed, this Court has instructed trial courts to consider all the facts and circumstances of a case when making preliminary findings concerning admissibility of evidence. See *Huddleston*, 485 U.S. at 690. And, as noted above, the D.C. Circuit has ruled in this very context that an important factor to consider in determining whether "evidence inculpating a third party" should be admitted is "the *relative strength* of the evidence that the third party committed the crime *compared with* the evidence that the defendant committed the crime." *Cabrerra*, 1996 WL

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[10] Indeed, federal courts routinely make such findings in determining whether character evidence is admissible under Fed. R. Evid. 404(b) and whether out-of-court statements are admissible under exceptions to the hearsay rule. See generally 21A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence 2d* § 5053.3 (2005). For example, several courts of appeals have held that a district court considering application of Fed. R. Evid. 804(b)(6)—which allows admission of hearsay statements where the defendant procured the unavailability of the declarant—need only find that the defendant was responsible for the declarant's unavailability by a preponderance of the evidence. See *United States* v. *Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *United States* v. *Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States* v. *Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States* v. *Dhinsa*, 243 F.3d 635, 653-6654 (2d Cir. 2001); *United States* v. *Emery*, 186 F.3d 921, 926-927 (8th Cir. 1999); *United States* v. *White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States* v. *Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). Thus, even in murder trials where the victim is the unavailable declarant, the Government may introduce the victim's hearsay statements if the court finds by a preponderance of the evidence that the defendant committed the murder. See *Gray*, 405 F.3d at 240-243.

135718, at *2; accord *Glaze*, 986 F.2d at 1196-1197; *Adams*, 124 P.3d at 29; *Johnson*, 200 Cal. App. 3d at 1564.

Both this Court's prior decisions and the Federal Rules of Evidence that it has proposed demonstrate that there is nothing unusual—and certainly nothing unconstitutional—about a trial court's determining admissibility based on facts proved by a preponderance of evidence. Yet here, South Carolina did not even require petitioner to make that much of a showing. Rather, it merely required him to show that his evidence raised some reasonable *inference* of his innocence in light of all the circumstances of the case. Requiring a reasonable inference of innocence is not at all the same as requiring convincing evidence of innocence. Thus, it simply is not true, as *amici* law professors assert, that South Carolina "permits a court to exclude an entire category of evidence of the defendant's innocence because the court is convinced of his guilt." Br. *Amicus Curiae* of Forty Professors of Evidence Law 15.

Petitioner would have a stronger argument had the court below assessed the credibility of witnesses and made its own determination of guilt. But it did not. Instead, it considered the facts that Jimmy White *denied* making any confession to the crime and that the FBI forensic examiner *excluded* White as a possible perpetrator, concluding that petitioner's evidence was not sufficiently probative to raise a reasonable inference of his own innocence. Admission of petitioner's evidence would have derailed the trial and diverted the jury's attention to issues about White's credibility and the validity of the FBI examiner's forensic tests.

B. South Carolina's approach to third-party-guilt evidence comports with the history of the Sixth Amendment.

The decision below—and South Carolina's approach to the admission of third-party-guilt evidence—is also

consistent with the history of the Sixth Amendment right to a jury trial, which has never included the right to have the jury decide questions of admissibility. More than a century ago, this Court affirmed the fundamental principle that judges decide questions of law, while juries decide questions of fact based on the law they receive from the court. See *Sparf* v. *United States*, 156 U.S. 51, 106 (1895). After canvassing English and early American authorities on the subject, the Court concluded that "the chief value, as well as safety, of the jury system" was the traditional "separation of the functions of court and jury." *Ibid.* See also 1 Wigmore on Evidence § 12, at 693 (Tillers rev. 1983) (noting that "in our system, the tribunal has traditionally been a divided one, so that the rule of law, uttered by the judge, merely declares what is sufficient to go to the jury and the jury ultimately decides upon the total effect of what we call proof").

The historical evidence supporting this conclusion included statements from leading American jurists and commentators recognizing the role of the trial court in determining the admissibility of evidence. For example, the Court recited Justice Curtis's statement in *United States* v. *Morris* that "it is the duty of the court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, *the admissibility of evidence*, and the like, *the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial.*" 156 U.S. at 75 (emphasis added).

To like effect was Forsyth's *History of Trial By Jury*, which the Court described as "a work of merit," and which noted that "the judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought or ought not to be submitted to the

jury." *Id.* at 88. Similarly, Justice Wilson had stated in one of his famous lectures that "[o]n questions of law, [the juror's] deficiencies will be supplied by the professional directions of the judges * * * . Questions of fact it is his exclusive province to determine. *With the consideration of evidence unconnected with the question which he is to try, his attention will not be distracted; for everything of that nature, we presume will be excluded by the court.*" *Id.* at 69 (emphasis added; quotations omitted).

Based on these authorities, the Court in *Sparf* stated unequivocally that the admissibility of evidence in a criminal trial is a question for the court, not the jury. See also *Gila Valley*, 232 U.S. at 103 ("Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact").

The Court's position in *Sparf* is consistent with the view of a leading commentator on the law of evidence in the late nineteenth century. According to Professor Thayer, "there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact. The maxim ["the judges do not answer the question of fact, the jurors do not answer the question of law"] was never true, if taken absolutely. * * * [I]t relates only to issues of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial; and so of many of those which present themselves during the trial. The maxim has nothing to do with matters of evidence, but only with a limited class of questions of fact; namely, questions raised by the pleadings, questions of ultimate fact." James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 185-187 (1898).

Later, even as the Court applied to the States various Sixth Amendment guarantees—including the jury trial guarantee—the Court was careful not to upset this basic

separation of functions between judge and jury. Thus, the Court in *Lego* remarked that "*Duncan* v. *Louisiana*, which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury." 404 U.S. at 490 (citation omitted).

No doubt because of this fundamental proposition – that trial courts are solely responsible for decisions on admissibility of evidence – this Court has never held that the Sixth Amendment right to a jury trial requires that the jury determine whether proffered evidence, even exculpatory evidence, should be received into evidence. To the contrary, the Court has repeatedly addressed constitutional issues about the admission or exclusion of evidence in terms of the scope of the trial court's discretion. *E.g.*, *Old Chief*, 519 U.S. at 180; *Daubert*, 509 U.S. at 589; *Bourjaily*, 483 U.S. at 175. It is hardly surprising, then, that the Court has found the rule of *Winship* wholly inapplicable to questions concerning admissibility of evidence. *Lego*, 404 U.S. at 487. For the same reason, there is no Sixth Amendment violation here.

III. Even If Exclusion of Third-Party-Guilt Evidence In This Case Were Erroneous, Any Such Error Would Be Subject to Harmless-Error Analysis.

Even if the Court were to conclude that South Carolina's application of its rules on third-party-guilt evidence was erroneous in this case, any such error would be subject to harmless-error analysis. This Court has often reaffirmed that "a constitutional error does not automatically require reversal of a conviction." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Indeed, "*most* constitutional errors can be harmless." *Ibid.* (emphasis added). Moreover, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). This presumption follows from the premise that the Constitution

entitles a criminal defendant to a trial that is fair, not perfect. *Van Arsdall*, 475 U.S. at 681.

As this Court noted in *Fulminante*, the "common thread" among the cases in which the Court has applied harmless-error analysis is that "each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-308. Such "trial errors" are distinguished from "structural defects in the constitution of the trial mechanism"—errors that "affect[] the framework within which the trial proceeds." *Id.* at 309-310. Structural errors include errors such as deprivation of the right to counsel at trial, participation of a biased judge, and improper exclusion of members of the defendant's race from a grand jury. *Ibid.*

The error alleged in this case is a "trial error" subject to harmless-error analysis. Like other Sixth Amendment violations, the alleged error here concerned the presentation of evidence to the jury and did not affect the structural framework within which the trial occurred. *Cf. Satterwhite* v. *Texas*, 486 U.S. 249, 258 (1988) (admission of evidence in violation of the defendant's right to counsel); *Van Arsdall*, 475 U.S. at 684 (limitation on cross-examination in violation of the defendant's right to confront witnesses); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the defendant's right to counsel). Indeed, this Court has already recognized that a trial court's exclusion of evidence in violation of the defendant's right to present a complete defense is subject to harmless-error analysis. See *Crane*, 476 U.S. at 691. As we explain below, the Court should reach the same conclusion here.

A fair examination of the record in this case reveals that any error in excluding petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a

reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). As the Court stated in *Rose*, a judgment of conviction should be affirmed "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." 478 U.S. at 579.

The court below detailed the overwhelming evidence pointing to petitioner—and petitioner alone—as the guilty party. The evidence before the jury showed that: (1) a police officer saw petitioner in the victim's neighborhood just 45 minutes before the attack; (2) petitioner matched the victim's description of her attacker; (3) although petitioner told the police he had never been inside the victim's apartment, his palm print was found on the inside of her front door; (4) fibers consistent with petitioner's sweatshirt and jeans were found on the victim's bed sheets and nightgown; (5) fibers consistent with the victim's nightgown were found on petitioner's underwear; (6) petitioner's tank top contained a mixture of his blood and the victim's blood, and (7) petitioner's underwear contained a mixture of DNA from two people, and forensic examination had excluded as the sources of this DNA 99.99% of the population other than petitioner and the victim. *Holmes*, 605 S.E.2d at 21-22. At the same time, the State proffered evidence from a forensic examiner that *excluded* the third party, Jimmy White, as a possible perpetrator. *Id.* at 24.

This evidence would provide an ample basis for the Court to conclude that any error in the exclusion of petitioner's third-party-guilt evidence—if the Court believes it was error—was harmless beyond a reasonable doubt. The Court should affirm the decision below on that ground if it finds it necessary to reach the issue.

CONCLUSION

The decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted.

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directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. This rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability; evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Shields* v. *Arkansas*, 166 S.W.3d 28, 32 (Ark. 2004) (citations omitted).

CALIFORNIA

"To be admissible, the third-party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.*** [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *People* v. *Hall*, 718 P.2d 99, 104 (Cal. 1986) (*en banc*) (quotations omitted).

"A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his or her own guilt. *** Once the defendant's evidence has been found to raise a reasonable doubt, it may only be excluded if it is more prejudicial than probative." *People* v. *Johnson*, 200 Cal. App. 3d 1553, 1563 (Cal. Ct. App. 1988).

COLORADO

"Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *People* v. *Mulligan*, 568 P.2d 449, 456 (Colo. 1977).

"A defendant may introduce evidence implicating another person in the crime charged. The culpability of another person is usually inferred from evidence of such person's motive or opportunity to commit the crime. To present evidence of opportunity or motive, a defendant must first establish that the other person committed some act directly connecting that person with the crime charged." *People* v. *Owens*, 97 P.3d 227, 235 (Colo. Ct. App. 2004) (citations omitted).

CONNECTICUT

"Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which *directly connects* that third party with the crime. The defendant can always show that some other person and not the defendant committed the crime; however, it is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person." *Connecticut* v. *Payne*, 591 A.2d 1246, 1259 (Conn. 1991) (quotations and citations omitted); *Connecticut* v. *Giguere*, 439 A.2d 1040, 1043 (Conn. 1981).

"We have recognized consistently that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. *** The defendant must, however, present evidence that directly connects a third party to the crime ***. It is not enough to show that

another had the motive to commit the crime * * * nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." *Connecticut* v. *West*, 877 A.2d 787, 802 (Conn. 2005) (quotations omitted).

DELAWARE

Research revealed no reported decision addressing this issue specifically.

DISTRICT OF COLUMBIA

"[T]he evidence must establish proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. The focus of the standard is not on the third party's guilt or innocence, but on the effect the evidence has upon the defendant's culpability, and in this regard it need only tend to create a reasonable doubt that the defendant committed the offense. However, the trial court should still exclude evidence that is too speculative with respect to the third party's guilt." *McCullough* v. *United States*, 827 A.2d 48, 55 (D.C. 2003) (quotations and citations omitted).

"[The court in *Johnson* v. *United States*, 552 A.2d 513 (D.C. 1989) explained that] there must be proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. * * * Sitting *en banc*, we now adopt the reasonable possibility formulation of *Johnson* and its conclusion that relevance here means what it generally does in the criminal context, requiring a link, connection or nexus between the proffered evidence and the crime at issue. * * * [The *Johnson* standard] insures the exclusion of evidence that is too remote in time and place, completely

unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt." *Winfield* v. *United States*, 676 A.2d 1, 4-5 (D.C. 1996) (*en banc*) (quotations and citation omitted).

FLORIDA

"[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." *Rivera* v. *Florida*, 561 So. 2d 536, 539 (Fla. 1990).

"When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant. If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. * * * Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence." *Florida* v. *Savino*, 567 So. 2d 892, 894 (Fla. 1990) (citations omitted).

GEORGIA

"Certainly a defendant is entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant is tried. However, the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the corpus delicti, or show

that the other person has recently committed a crime of the same or similar nature." *Klinect* v. *State*, 501 S.E.2d 810, 813-814 (Ga. 1998) (citations omitted); *Allen* v. *State*, 561 S.E.2d 397, 402 (Ga. 2002).

HAWAII

"We are persuaded that the 'legitimate tendency' test comports with the relevancy test set forth in HRE Rule 401, instructing that 'relevant evidence means evidence having any tendency to make the existence of any fact * * * more or less probable. It is clear that there must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive." *Hawaii* v. *Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995).

IDAHO

"It is permissible for an accused to show that another might have committed the crime for which the accused is on trial. However: It is well established that before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances, as tend clearly to point out someone besides the accused as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose. A defendant in a criminal trial is not: * * * permitted by way of defense to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that some one other than he is more probably guilty." *Idaho* v. *Larsen*, 415 P.2d 685, 690 (Idaho 1966) (quotations and citations omitted).

ILLINOIS

"Although a defendant in a criminal case may offer evidence that tends to show that someone else committed the offense with which he is charged, such evidence should be excluded on the basis that it is irrelevant if it is too remote or too speculative." *People* v. *Kirchner*, 743 N.E.2d 94, 114 (Ill. 2000).

"It is well settled that an accused may attempt to prove that someone else committed the crime with which he is charged. However, if the evidence is too remote or too speculative, or if it fails to link a third person with the commission of the crime, then the trial court should exclude the evidence." *People* v. *Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993) (citation omitted).

INDIANA

"The State urges that we apply the standard set forth in *Burdine* v. *State*, 515 N.E.2d 1085 (Ind. 1987), regarding the relevancy, and thus admissibility, of evidence that a person other than the defendant committed the crime. Such evidence 'must do more than cast suspicion or raise a conjectural inference that a third party committed the crime; it must directly connect the third party to the crime charged.' Rather, our review is guided by the Indiana Rules of Evidence ***. Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of relevance in Rule 401." *Joyner* v. *Indiana*, 678 N.E.2d 386, 389-390 (Ind. 1997) (citations omitted).

IOWA

"Evidence offered by a defendant tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense. The defendant's attempt to show that some unknown person may have had a motive to murder Smith, other than an intent to rob him, falls short of creating even a mere suspicion and, indeed, is based on a highly speculative premise.

* * * The evidence has little or no probative value, but would be highly prejudicial to the State if admitted. The jury could be led to conclude that Smith was killed by someone who believed he had molested children, or that Smith's life-style was so generally reprehensible he deserved to die. The potential for improper consideration of the evidence substantially outweighs any probative value it might have.

Furthermore, had the defendant prevailed in his resistance to the motion in limine, this trial rapidly could have disintegrated into two trials, the second issue being whether the deceased was in fact a child molester or pedophile. Admission of the evidence would confuse the issues and mislead the jury. The district court could properly consider these matters in concluding that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Iowa* v. *Wilson*, 406 N.W.2d 442, 447-448 (Iowa 1987).

KANSAS

"We made clear [in *Kansas* v. *Marsh*, 102 P.3d 445 (Kan. 2004)] that admission of third-party evidence did not turn on the sometimes hazy distinction between direct and circumstantial evidence. Rather, we said, a district judge must evaluate the totality of facts and circumstances in a given case to determine whether the defense's proffered

evidence effectively connects the third party to the crime charged. In addition, we said, '[W]hile evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence connecting the third party to the crime.'

* * *

The State had a wealth of evidence against [the defendant], both direct and circumstantial. He confessed to the crime, demonstrating for law enforcement how he threw [the victim] down and shook her. Expert medical testimony established that [the victim's injuries] occurred approximately 10 to 14 hours before she was declared dead and that the injuries would have made her unconscious immediately. [The defendant] was with her in the relevant time period, while [the third party] was not. * * *

Neither of the pieces of evidence [the defendant] proffered could place [the third party] at the crime scene * * * and thus link her to [the victim's] fatal injuries. * * * Defendant's theory of the case lacked a critical element—medical evidence that injuries inflicted at a time when [the third party] was with [the victim] could have caused [the victim's] death. Without competing evidence on the mechanism and timing of the fatal injuries, [the defendant's] effort to pin blame on [the third party] amounted to baseless innuendo. In such a situation, the district judge's decision to exclude the [third-party-guilt evidence] did not qualify as an abuse of discretion." *Kansas* v. *Adams*, 124 P.3d 19, 28-29 (Kan. 2005) (quotations and citation omitted).

KENTUCKY

"[E]vidence is not automatically admissible simply because it tends to show that someone else committed the offense. For example, evidence of motive alone is insufficient to guarantee admissibility. In a homicide case, a defendant is

not entitled to parade before the jury every person who bore some dislike for the victim without showing that the [alleged alternative perpetrators] at least had an opportunity to commit the murder. *** In the same way, evidence of opportunity alone is insufficient to guarantee admissibility. Simply showing that the [alleged alternative perpetrator] was at the scene of the crime, without also showing some connection between the [alleged alternative perpetrator] and the crime, will generally not be allowed." *Beaty* v. *Kentucky*, 125 S.W.3d 196, 208 (Ky. 2003) (citations omitted).

LOUISIANA

Research revealed no reported decision addressing this issue specifically.

MAINE

"We have previously recognized the right of a criminal defendant in appropriate circumstances *** to introduce evidence to show that another person committed the crime or had the motive, intent, and opportunity to commit it. The trial court also has discretion to exclude such evidence if it is too speculative or conjectural or too disconnected from the facts of the case against the defendant. In other words, evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability." *Maine* v. *Conlogue*, 474 A.2d 167, 172 (Me. 1984) (quotations and citations omitted).

"For alternative perpetrator evidence to have sufficient probative value to raise a reasonable doubt as to the defendant's culpability, it must be more than speculative and conjectural. The evidence incriminating another person must be competent and confined to substantive facts which create more than a mere suspicion that the other person

committed the crime. *** The connection between the alternative perpetrator and the crime must be reasonably established by the admissible evidence the defendant is prepared to offer. Without such evidence, a defendant cannot be allowed to use his trial to conduct an investigation that he hopes will convert what amounts to speculation into a connection between the other person and the crime." *Maine* v. *Dechaine*, 572 A.2d 130, 134 (Me. 1990) (quotations and citations omitted).

MARYLAND

Research revealed no reported decision addressing this issue specifically.

MASSACHUSETTS

"It is well established that a defendant should be allowed to introduce evidence that another person recently committed a similar crime by similar methods, since such evidence tends to show that someone other than the accused committed the particular crime. We have stated previously that evidence involving crimes of a similar nature by a person other than the defendant must be admitted when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime." *Commonwealth* v. *Scott*, 564 N.E.2d 370, 374 (Mass. 1990) (quotations and citations omitted).

MICHIGAN

Research revealed no reported decision addressing this issue specifically.

MINNESOTA

"Alternative perpetrator evidence is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime. Our requirement that such evidence have an inherent tendency to connect the other party with the crime avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased. Once a foundation is laid with evidence having an inherent tendency to connect the alleged alternative perpetrator to the commission of the crime, it is permissible to introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act, in order to cast a reasonable doubt on the state's case. " *Minnesota* v. *Jones*, 678 N.W.2d 1, 16-17 (Minn. 2004) (quotations and citations omitted).

"That defendants should be afforded leeway in the admission of other-crimes evidence, however, does not mean that the defendant should be allowed to throw strands of speculation on the wall and see if any of them will stick. At the preliminary fact stage, to avoid the consideration of matters collateral to the crime, the trial court must be satisfied that there is a direct connection between the third party and the charged crime ***. Certainly matters of credibility and inference are for the jury; but in determining preliminary questions of fact in the admissibility of evidence, the trial court need not disregard the evidence already admitted." *Minnesota* v. *Richardson*, 670 N.W.2d 267, 280 (Minn. 2003).

MISSISSIPPI

"It has been said that evidence incriminating another must relate to the res gestae, or directly connect the other person with the corpus delicti. In any event, before such testimony

can be received, there must be such proof of connection with the crime or such a train of facts or circumstances as tends to point out someone other than the accused as the guilty party. Remote acts, disconnected from and outside of the crime itself, cannot be separately proved for such a purpose." *Moore* v. *State*, 175 So. 183, 184 (Miss. 1937).

MISSOURI

"Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *Missouri* v. *Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*).

"A criminal defendant may not introduce evidence that another person had an opportunity or motive to commit the crime charged without proof that the other person committed some act directly connecting him with the crime." *Missouri* v. *Wise*, 879 S.W.2d 494, 510 (Mo. 1994) (*en banc*) (quotations omitted).

MONTANA

Research revealed no reported decision addressing this issue specifically.

NEBRASKA

Research revealed no reported decision addressing this issue specifically.

aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons were possible suspects in the murder. In such a system, the resulting trial would be a confusing waste of judicial resources. The concerns voiced in *Marrone* have led virtually every state to require some kind of preliminary evidentiary showing before allowing introduction of alternative-perpetrator evidence." *Smithart* v. *Alaska*, 988 P.2d 583, 586-587 (Alaska 1999) (quotations and citations omitted).

"[U]nder the *Smithart-Marrone* rule, evidence of another person's motive to commit the crime, or evidence of another person's opportunity to commit the crime, standing alone, will not be admissible when offered to prove that this other person may have committed the crime." *Cleveland* v. *Alaska*, 91 P.3d 965, 972 (Alaska Ct. App. 2004).

ARIZONA

"It is permissible for a defendant to attempt to show that another person committed the crime for which he is charged, but it remains in the trial court's discretion to exclude the evidence if it offers only a possible ground of suspicion against another. * * * We explained in [*Arizona* v. *Gibson*, 44 P.3d 1001 (Ariz. 2002)] that the proper focus in determining relevancy is the effect the evidence has upon the defendant's culpability. To be relevant, the evidence need only tend to create a reasonable doubt as to the defendant's guilt." *Arizona* v. *Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*) (quotations and citations omitted).

ARKANSAS

"[A] defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points

APPENDIX B

INDIVIDUAL STATE STANDARDS ADDRESSING THIRD-PARTY-GUILT EVIDENCE

ALABAMA

"It is generally agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted. * * * The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one. To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence must relate to the res gestae of the crime; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence would have to be admissible if the third party was on trial." *Ex parte Hall*, 820 So. 2d 152, 156-157 (Ala. 2001) (quotations and citations omitted).

ALASKA

"Under Alaska law, a defendant may always generally suggest that someone other than the defendant is guilty of the charged crime. But when a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime charged. This rule derives from considerations of relevance and materiality; as we explained in *Marrone* v. *State*, such an initial evidentiary showing is necessary because if evidence of motive alone upon the part of other persons were admissible * * * in a case involving the killing of a man who had led an active and

NEVADA

Research revealed no reported decision addressing this issue specifically.

NEW HAMPSHIRE

Research revealed no reported decision addressing this issue specifically.

NEW JERSEY

"A defendant of course may seek to prove that another agency produced the death with which he is charged. It would seem in principle to be sufficient if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case. *** We think it not enough to prove some hostile event and leave its connection with the case to mere conjecture. Somewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State's case." *New Jersey* v. *Sturdivant*, 155 A.2d 771, 778 (N.J. 1959).

"Courts must provide criminal defendants with a meaningful opportunity to present a complete defense. We have held that, by implication, a complete defense includes a criminal defendant's right to introduce evidence of third-party guilt if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case. That standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt. However, a defendant cannot simply seek to introduce evidence of some hostile event and leave its connection with the case to mere conjecture. Rather, a defendant's proofs must be capable of

demonstrating some link between the third-party and the victim or the crime." *New Jersey* v. *Cotto*, 865 A.2d 660, 669-670 (N.J. 2005) (quotations and citations omitted).

NEW MEXICO

Research revealed no reported decision addressing this issue specifically.

NEW YORK

"In third-party culpability cases, the Appellate Divisions employ the 'clear link' standard, rather than couching their review in terms of weighing probative value against countervailing risks. Courts in other jurisdictions use similar phrases, such as 'direct connection' and 'point directly.' These catch phrases merely reinforce the notion that remote evidence of a third party's culpability—will not be sufficiently probative to outweigh the risk of trial delay, undue prejudice or jury confusion. As one commentator notes, phrases like 'clear link' are usually shorthand for weighing probative value against prejudice in the context of third-party culpability evidence: if there is some 'clear link' or 'direct connection between the third-party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible. To the extent that the 'clear link' standard implies no more than an abbreviation for the conventional balancing test, it presents no problem. A review of clear link cases reveals that the courts would very likely have made the same ruling regardless of the nomenclature. * * * The better approach, we hold, is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence. In this setting, we note that the countervailing risks of delay, prejudice and confusion are particularly acute. * * * The admission of evidence of

third-party culpability may not rest on mere suspicion or surmise." *People* v. *Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001) (citations omitted).

NORTH CAROLINA

"The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy stated in Rule 401. The rule of relevancy for evidence of this nature is that it must do more than cast doubt over the defendant's guilt merely because it is possible some other person could have been responsible for the crime with which he has been charged. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant." *North Carolina* v. *Israel*, 539 S.E.2d 633, 637 (N.C. 2000) (quotations and citation omitted).

NORTH DAKOTA

Research revealed no reported decision addressing this issue specifically.

OHIO

Research revealed no reported decision addressing this issue specifically.

OKLAHOMA

"[E]vidence offered to show that some other person committed the crime charged must connect such other

person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused." *Gore* v. *Oklahoma*, 119 P.3d 1268, 1274 (Okla. Crim. App. 2005); *Romano* v. *Oklahoma*, 847 P.2d 368, 381 (Okla. Crim. App. 1994).

OREGON

Research revealed no reported decision addressing this issue specifically.

PENNSYLVANIA

"An accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by established evidentiary rule. It is well established that evidence which demonstrates that the crime was committed by someone else is admissible." *Pennsylvania* v. *Chamberlain*, 731 A.2d 593, 597 (Pa. 1999) (citations omitted).

"The trial court determined that the offered testimony as to appellant's resemblance to another person was not relevant because there was no connection between this other person and the crime at issue. The newspaper article [suggesting another suspect] was excluded as hearsay. We find no abuse of discretion by the court in these rulings and appellant's claim of error must be rejected." *Pennsylvania* v. *Saksek*, 522 A.2d 70, 71-72 (Pa. Super. Ct. 1987).

RHODE ISLAND

"The defendant it appears was apparently trying to prove, through Salerno's testimony, that another person could have possibly committed the murder of Diaz. However, nothing in defense counsel's offer of proof disclosed any possible

connection between the shooting of Erickson Diaz and the presence of the yellow car. Although that car was allegedly seen near the scene of the shooting and coincidentally also at the scene of an earlier disturbance some several miles distant in the same city, there was nothing presented to the trial justice indicating that there was anything to connect the yellow car to the shooting of Diaz." *State* v. *Mendoza*, 709 A.2d 1030, 1035-1036 (R.I. 1998).

SOUTH CAROLINA

"The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose." *Holmes* v. *State*, 605 S.E.2d 19, 23 (S.C. 2004).

SOUTH DAKOTA

"We find the case of *Perry* v. *Rushen*, 713 F.2d 1447 (9th Cir. 1983), persuasive. *** The Perry court summarized the rules as follows: Where the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected. *** The court must balance the importance of the evidence against the state interest in exclusion. We then balance the equation in the

manner suggested in *Perry*. We start by giving due weight to the substantial state interest in preserving orderly trials, and judicial sufficiency [sic], and in excluding unreliable or prejudicial evidence." *South Dakota* v. *Luna*, 378 N.W.2d 229, 233-234 (S.D. 1985) (quotations omitted).

"The rule expressed in *Luna* dos not infringe upon [the defendant's] right to due process for the reason that the evidence, in her case, is so weak in probative value and presents such an opportunity to confuse the jury and to waste time to a far greater degree than in *Luna*." *South Dakota* v. *Jenner*, 451 N.W.2d 710, 722 (S.D. 1990) (citation omitted); accord *South Dakota* v. *Larson*, 512 N.W.2d 732, 740 (S.D. 1994).

TENNESSEE

"It has long been recognized by the courts of this state that an accused is entitled to present evidence implicating others in the crime. However, a clear standard for the admission of such evidence has never been articulated. A majority of states apply a 'direct connection' test in making this determination. Under a 'direct connection' test, the evidence must directly connect the third party with the substance of the crime and must clearly point out someone besides the accused as the guilty person in order to be admissible. We believe, however, that such a standard imposes too high a threshold for the admissibility of evidence concerning third-party culpability. We hold the Rules of Evidence are adequate to determine whether such evidence is admissible." *Tennessee* v. *Powers*, 101 S.W.3d 383, 394-395 (Tenn. 2003) (quotations and citation omitted).

TEXAS

"In weighing probative value against Rule 403 counterfactors, courts must be sensitive to the special

problems presented by 'alternative perpetrator' evidence. Although a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged 'alternative perpetrator..'" *Wiley* v. *Texas*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002).

"The general rule is that an accused may not bring in evidence that a third person may have had a motive to commit the crime with which the accused is charged. An exception exists if the accused can link the third person to the crime." *Spence* v. *Texas*, 795 S.W.2d 743, 754-755 (Tex. Crim. App. 1990).

UTAH

Research revealed no reported decision addressing this issue specifically.

VERMONT

"Defendant is correct that as part of his defense he is permitted to introduce evidence implicating others in the crimes for which he is accused. Such evidence, however, must conform to the rules of evidence, and may be excluded when the danger of unfair prejudice or confusion substantially outweighs its probative value. We have previously stated the test for relevance of such evidence: evidence tending to show a third party's involvement in a crime should be admitted as long as motive and opportunity have been shown and *** there is also some evidence to directly connect the third person to the crime charged." *Vermont* v. *Grega*, 721 A.2d 445, 454 (Vt. 1998) (citations omitted)

VIRGINIA

"[W]here there is a trend of facts and circumstances tending clearly to point out some other person as the guilty party, the prisoner may introduce any legal evidence which is available tending to prove that another person committed the crime with which he is charged." *Karnes* v. *Commonwealth*, 99 S.E. 562, 565 (Va. 1919).

"The right to present evidence in one's defense does not, however, permit a defendant to introduce evidence that merely suggests or insinuates that because a third party resembles the accused, the third party *may* have some connection to the crime. Such evidence is irrelevant; it tends to confuse and mislead a jury unless evidence has been introduced * * * that points directly to guilt of a third party." *Oliva* v. *Virginia*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) (quotations and citations omitted).

WASHINGTON

"[E]vidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party." *Matter of Lord*, 868 P.2d 835, 849 (Wash. 1994) (*en banc*).

"When there is no other evidence tending to connect another person with the crime, such as his bad character, his means or opportunity to commit the crime, or even his conviction of the crime, such other evidence is irrelevant to exculpate the accused. Mere opportunity to commit the crime is not enough as such evidence is the most remote kind of speculation." *Washington* v. *Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*) (quotations and citations omitted); *Washington* v. *Maupin*, 913 P.2d 808, 812 (Wash. 1996) (*en banc*).

WEST VIRGINIA

"In a criminal case, the admissibility of testimony implicating another person as having committed a crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible." *West Va.* v. *Parr*, 534 S.E.2d 23, 29 (W. Va. 2000); *West Va.* v. *Harman*, 270 S.E.2d 146, 150 (W. Va. 1980).

WISCONSIN

"The general rule is that evidence of motive of one other than the defendant to commit the crime can be excluded when there is no other proof directly connecting that person with the offense charged. * * * [A] defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues. * * * Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Wisconsin* v. *Denny*, 357 N.W.2d 12, 16-17 (Wis. Ct. App. 1984) (quotations and citations omitted).

WYOMING

Research revealed no reported decision addressing this issue specifically.